Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

CHARLES C. STONE AND DORA B. STONE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Defendants were denied their right of Confrontation under the Sixth Amendment to The United States Constitution by the admission of hearsay testimonial evidence in their sentencing hearing which was not subject to cross examination.

The question for this Court is, therefore, whether Crawford v. Washington, 541 US 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (March 8, 2004) applies to sentencing hearings.

RULE 14.1(b) STATEMENT

The Petitioner/Appellant: Charles C. Stone and Dora B. Stone.

Respondent/Appellee: United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles and Dora Stone respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion for the Court of Appeals as well as its ordering denying a rehearing are attached as Appendix A and B.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 23, 2005 and the Order denying re-hearing was entered on March 23, 2006. This Court's jurisdiction is invoked under Rule 10 of the Rules of Supreme Court of The United States.

STATUTORY AND REGULARTORY PROVISIONS INVOLVED

The Confrontation Clause of the Sixth Amendment to the United States Constitution regulates the applicability of the Confrontation Clause to sentencing hearings in the Federal Courts.

STATEMENT

The District Court and Court of Appeals below denied the applicability of the Confrontation Clause for sentencing hearing.

REASON FOR GRANTING PETITION

In recent year the Supreme Court has zealously enforced the provisions of the Sixth Amendment as written. In Crawford v. Washington, 541 US 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (March 8, 2004) the Supreme Court held that the Confrontation Clause trumps the Rules of Evidence in mandating that testimonial evidence be subject to cross examination.

There is nothing in Crawford which would indicate that this Court would not apply the Confrontation Clause to sentencing hearings. In fact, this Court has strictly applied the Sixth Amendment right to a jury trial in sentencing hearings in Blakely v. Washington, 124 S.Ct. 1493, 158L.Ed.2d 75, (Feb 23, 2004).

In its opinion in United States v. Katzopoulos, 437 F3d 567 (6th Cir 2006), the Sixth Circuit in holding that Crawford did not apply to sentencing hearings summarized the uncertainty of this area of the law as follows, the Court held that:

> "Though the cases maybe a broad signal of the future, there is nothing specific in *Blakely, Booker and Crawford* that would cause this Court to reverse its long-settled rule of law that the Confrontation Clause permits the admission of testimony of hearsay evidence at sentencing proceedings." At 576.

The Court noted that the Eleventh Circuit has opined that:

> "While [the *Crawford* Rule] may eventually be extended to the sentencing context that has not

happened ...." United States v. Chau, 426 F3d 1318 (11th Cir. 2005)

The Circuit Court also noted that a West Virginia District Court had stated:

> "For hotly contested issues, however, the truth-seeking function of the Confrontation Clause deserves attention at sentencing." United States v. Gray, 326 F2d 714 (2005).

In *Katcopoulos* the Sixth Circuit went on to note that in instant case before the Court the Stone panel held that:

> "It is an open question in this Circuit whether our rule that "Confrontation rights do not apply in sentencing hearings . . . applies after *Crawford*." Stone at 654 (quoting *United States v. Silverman*, 976 F2d 1502, 1510 (6th Cir. 1992)).

This Petition should be granted because a United States Court of Appeals has decided an important question of Federal Law that has not been, but should be, settled by Court. Rule 10(c) of the Supreme Court of The United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-6184/6185

[Filed March 23, 2006]

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
CHARLES C. STONE,)
)
Defendant-Appellant.)
)

BEFORE: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

OPINION

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-6184/04-6185

[Filed December 23, 2005]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CHARLES C. STONE (04-6184); DORA B. STONE (04-6185),	)
	)
Defendants-Appellants.	)
	)

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 02-00189 — Curtis L. Collier, District Judge.

Before: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

OPINION

KENNEDY, Circuit Judge. On March 26, 2004, Defendants Charles C. Stone and Dora B. Stone (collectively

"Defendants" or "the Stones") were convicted by a jury of one count of conspiring to defraud the United States by impeding the Internal Revenue Service in the ascertainment and collection of tax, in violation of Title 18 U.S.C. § 371, and three counts of attempting to evade income tax, in violation of Title 26 U.S.C. § 7201. They were both sentenced under the then mandatory U.S. SENTENCING GUIDELINES MANUAL (Guidelines). On appeal, they jointly and individually raise errors with respect to both their convictions and their sentences, primarily based on the United States Supreme Court's rulings in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). For the following reasons, we **AFFIRM** their convictions, but **REMAND** for re-sentencing.

BACKGROUND

Defendant Charles Stone owned Benton Manufacturing Company (BMC), a textile facility, located in Benton, Tennessee. Mr. Stone managed the company, and his wife, Mrs. Dora Stone, handled many administrative tasks, including keeping its books. BMC kept a corporate ledger of all expenses for the company. The ledger contained a stub for each check drawn on the corporate account. Mrs. Stone coded each stub to indicate what kind of corporate expense each check had been drawn to pay. She then provided the stubs to the corporate accountant, a Mr. Robert George, who would use those codes to determine whether each expense was a proper tax deduction on BMC's corporate tax return.

Between 1993 and 1995, Defendants drew on corporate accounts to pay for over $200,000 in personal expenses. Checks drawn on the corporate account during this period were used to remodel and furnish a summer home, for

portraits of family members, and for several trips to Florida. Defendants also charged large sums on their corporate American Express card for retail clothes, jewelry, household furniture, tanning products and services, hotels in the Carribean, pool and spa equipment, and monogrammed bathrobes. Defendants did not report any of these payments on their personal income tax returns. All of the expenses were coded in the corporate ledger and deducted from BMC's corporate tax return as ordinary and necessary business expenses.

The Government's principal witness was Internal Revenue Service Agent Theresa Cantrell ("Agent Cantrell"). Agent Cantrell was heavily involved in the investigation of the Stones. She testified at both the trial and during the sentencing phase.

ANALYSIS

Defendants first challenge their convictions. They allege that Agent Cantrell based much of her testimony on testimonial hearsay statements in violation of the U.S. Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Crawford* held that the "Confrontation Clause" of the Sixth Amendment prohibits the introduction of testimonial statements by witnesses not called to testify at trial. *Id.* at 68. Defendants argue that Agent Cantrell relied on out-of-court statements made by witnesses who did not testify at trial and that her opinions were inadmissible under *Crawford*. "The applicable standard of review for an evidentiary ruling of the district court where the evidentiary issues relate to a claimed violation of the Sixth Amendment is the *de novo* standard." *United States v. Robinson*, 389 F.3d 582, 592 (6th Cir. 2004).

Defendants, however, do not point to any testimony by Agent Cantrell that was not supported by prior in-court witness testimony or by documents properly admitted into evidence. In fact, the Government points to an exchange in which Agent Cantrell indicated that her expert opinions were based on witness testimony and documents properly admitted into evidence. Because Defendants do not establish that Agent Cantrell relied on out-of-court interviews of witnesses not called to testify, their *Crawford* argument is not well taken. As this *Crawford* argument is the only assignment of error relating to guilt Defendants make on appeal, their convictions are affirmed.

Defendants also allege several errors with respect to their sentences. First, Defendants allege that *Crawford* prohibits Agent Cantrell from opining on the amount of loss caused to the government based on out-of-court statements made by witnesses not called to testify at trial. Unlike during the conviction phase of the trial, Agent Cantrell arguably relied on "testimonial hearsay" statements during the sentencing phase of the trial. It is an open question in this circuit whether our rule that "confrontation rights do not apply in sentencing hearings . . ."applies after *Crawford*. *United States v. Silverman*, 976 F.2d 1502, 1510 (6th Cir. 1992) (en banc). *See also U.S. v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000). We are guided by our recent decision in *U.S. v. Kirby*, 418 F.3d 621, 627-28 (6th Cir. 2005), where we held that *Crawford* did not apply to evidence offered at revocation of supervised release hearings. In *Kirby*, we relied on our prior decision in *Silverman* as precedent establishing that the confrontation clause did not apply in sentencing proceedings. *Id.* The First Circuit has also evaluated this question and determined that nothing in *Crawford* compels a different result. *See U.S. v. Luciano*, 414 F.3d 174, 178-80 (1st Cir. 2005) ("Nothing in *Crawford* requires us to alter our previous

conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing."). We agree with the First Circuit. Because *Crawford* was concerned only with testimonial evidence introduced at trial, *Crawford* does not change our long-settled rule that the confrontation clause does not apply in sentencing proceedings.

Defendants' final joint challenge to their sentences is based on the Supreme Court's recent ruling in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 765, 160 L. Ed. 2d 621 (2005). *See also United States v. Oliver*, 397 F.3d 369, 378 (6th Cir. 2005). Defendants allege that the district court's determination of the amount of tax loss and the imposition of an obstruction of justice enhancement violated their Sixth Amendment rights. Based on the Supreme Court's ruling in *Booker*, the Sentencing Guidelines are no longer mandatory; they are advisory. *Booker*, 125 S. Ct. at 764. *See also Oliver*, 397 F.3d at 378. In *U.S. v. Barnett*, 398 F.3d 516, 526-30 (6th Cir. 2005), this court determined that a sentence imposed under the mandatory Guidelines is plain error that requires a remand for re-sentencing. Under *Oliver* and *Barnett*, we must remand this case to the district court for re-sentencing.

Insofar as Defendants argue that the district court should not make judicial findings of fact as to the amount of tax loss, or as to whether Defendants obstructed justice, those assignments of error are not well taken. *Booker* did not eliminate judicial fact-finding. Instead, the remedial majority gave district courts the option, after calculating the Guideline range, to sentence a defendant outside the resulting Guideline range. *Booker*, 125 S. Ct. at 764, 769; *U.S. v. Williams*, 411 F.3d 675, 678 (6th Cir. 2005). District courts, in cases such as these, must, therefore, calculate the Guideline range as they would have done prior to *Booker*, but then sentence

defendants by taking into account all of the relevant factors of 18 U.S.C. § 3553, as well as the Guidelines range.[1]

Finally, we address the argument made by Defendant Charles Stone that the district court should have reduced his sentence to reflect his claimed minor role in the offense pursuant to United States Sentencing Guideline ("U.S.S.G.") § 3B1.2. Defendant Charles Stone has the burden of proving this mitigating factor by a preponderance of the evidence. *See U.S. v. Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993). We review a district court's fact-based culpability determination for clear error. *See id.* Mr. Stone attempts to meet his burden of demonstrating he is entitled to this reduction by arguing that it was Mrs. Stone who falsely coded the BMC check stubs and that he made relatively few purchases with the corporate American Express card. Even if this were true, the facts on the record concerning Mr. Stone's role in the crimes are substantial. Mr. Stone was the sole owner of BMC, he signed all of the fraudulently coded checks, signed the fraudulent tax returns, received five times the salary from BMC than that of Mrs. Stone, and split with her the tax benefits of the unreported income and false deductions. Thus, as the Government states, "without [Mr. Stone's] contributions, the scheme could not have succeeded." (Appellee's Br. at 32.). An indispensable contributor to a conspiracy cannot be a minor participant entitled to a role

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[1] We make no finding at this stage as to the reasonableness of sentences above or below the advisory Guideline range in this case. In addition, because we are remanding the case for re-sentencing, the district court must also determine anew the amount of restitution that the Defendants should pay. We note that we recently decided that *Booker* does not apply to orders of restitution. *See United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005).

reduction under U.S.S.G. § 3B1.2. *United States v. Samuels*, 308 F.3d 662, 672 (6th Cir. 2002).

CONCLUSION

For the foregoing reasons, we **AFFIRM** Defendants' convictions, but we **VACATE** their sentences and **REMAND** for re-sentencing.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

No. 1:02-CR-189

[Filed July 8, 2004]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
CHARLES C. STONE,	)
DORA B. STONE, and	)
L. BYRON WOODY	)
	)

JUDGES: CURTIS L. COLLIER, UNITED STATES DISTRICT JUDGE.

OPINION

MEMORANDUM & ORDER

I. INTRODUCTION

In this criminal tax prosecution, Defendants Charles Stone, Dora Stone, and Byron Woody were charged in Count One with conspiracy to defraud the United States in violation of Title 18, United States Code, Section 371, and Charles Stone and Dora Stone were charged with three counts of

attempted tax evasion in violation of Title 26, United States Code, Section 7201 (Court File No. 1, Indictment). Count One alleged the defendants conspired to defraud the United States for the purpose of defeating the assessment of income taxes, and it alleged a number of overt acts were committed in furtherance of the conspiracy (*Id.* PP 13-23).

During the charge conference, the Court faced two issues relating to the Court's final instructions to the jury regarding the conspiracy count and finding an overt act in furtherance of the charged conspiracy. The first issue was whether the jury must be unanimous on which particular overt act or acts in furtherance of the conspiracy were committed. The second issue was whether the jury is limited to considering just the overt acts alleged in the indictment or whether the jury is permitted to consider other, unalleged overt acts supported by the evidence, in finding whether an overt act was committed.

When the Court was presented with these issues, the parties had not provided the Court with any authorities on point. Within the precise time frame the Court had to first consider the issues, the Court was also unable to locate any clear authority from the United States Court of Appeals for the Sixth Circuit on these precise issues. However, after the issues were raised the Court located ample authority, including some from other jurisdictions, and concluded the law was sufficiently clear to allow it to formulate a charge.

II. ANALYSIS

A. Proof of Overt Acts in Furtherance of a Conspiracy Are Means of Proving the Commission of the Conspiracy

As a starting point for analysis, the Court will examine some of the basic tenets of conspiracy law. "The [United

States Supreme] Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" *United States v. Jimenez Recio*, 537 U.S. 270, 274, 123 S. Ct. 819, 822, 154 L. Ed. 2d 744 (2003) (quoting *Iannelli v. United States*, 420 U.S. 770, 777, 95 S. Ct. 1284, 1289, 43 L. Ed. 2d 616 (1975)). The law forbids such agreements for a variety of reasons, including because concerted action decreases the likelihood the conspirators will turn from their agreed upon criminal plans and makes the commission of substantive crimes more likely. *Jimenez Recio*, 537 U.S. at 275, 123 S. Ct. at 822; *Iannelli*, 420 U.S. at 778, 95 S. Ct. at 1290 (quoting *Callanan v. United States*, 364 U.S. 587, 593-94, 81 S. Ct. 321, 325, 5 L. Ed. 2d 312 (1961)). Because a conspiracy is a "distinct evil" independent of any substantive crime that is an object of the conspiracy, the agreement to commit a crime may be prosecuted and punished regardless of whether the substantive crime occurs. *Salinas v. United States*, 522 U.S. 52, 65, 118 S. Ct. 469, 477-78, 139 L. Ed. 2d 352 (1997) (citing *Callanan*, 364 U.S. at 594, 81 S. Ct. at 325).

At common law, the offense of conspiracy did not require the allegation or proof of an overt act in furtherance of the conspiracy. *See United States v. Shabani*, 513 U.S. 10, 13-14, 115 S. Ct. 382, 384, 130 L. Ed. 2d 225 (1994); *Fiswick v. United States*, 329 U.S. 211, 216 n.4, 67 S. Ct. 224, 227 n.4, 91 L. Ed. 196 (1946). The common law definition of conspiracy has been adopted by Congress for certain federal conspiracy offenses, including conspiracies to commit controlled substance offenses (21 U.S.C. § 846), conspiracies to commit antitrust offenses (15 U.S.C. § 1), and conspiracies to commit racketeering offenses (18 U.S.C. § 1962(d)). *See Salinas*, 522 U.S. at 63, 118 S. Ct. at 476; *Shabani*, 513 U.S. at 14, 115 S. Ct. at 385. However, the general federal conspiracy statute, 18 U.S.C. § 371, contains an explicit

overt act component that requires the government to prove a member of the conspiracy did some "act to effect the object of the conspiracy." 18 U.S.C. § 371; *Shabani*, 513 U.S. at 14, 115 S. Ct. at 385. Because Count One in this case charged Defendants with conspiracy to defraud the United States in violation of 18 U.S.C. § 371, the Government was required to prove a member of the conspiracy committed an overt act in furtherance of the conspirac

In *United States v. Negro*, the United States Court of Appeals for the Second Circuit reviewed a conviction under the general conspiracy statute (formerly 18 U.S.C. § 88), and it considered whether an overt act is an element of conspiracy for the purpose of determining whether proof of an unalleged overt act may support a conspiracy conviction. *United States v. Negro*, 164 F.2d 168, 172 (2d Cir. 1947). The court discussed six Supreme Court cases decided from 1879 through 1942 regarding the relationship between a conspiracy and an overt act in furtherance of it (*i.e.*, whether an overt act is part of the offense defined by the general conspiracy statute or whether an overt act is separate from the crime of conspiracy and yet is either a required mode of proving the conspiracy existed or a device for affording a locus poenitentiae). *Id.* It then concluded an overt act is not part of the crime of conspiracy for at least some purposes. *Id.* at 173 (citing *United States v. Cohen*, 145 F.2d 82, 94 (2d Cir. 1944) ("It has been said over and over again that the conspiracy, not the overt act, is the "gist" of the crime."); *Marino v. United States*, 91 F.2d 691, 694-95 (9th Cir. 1937) ("An overt act is something apart from the conspiracy, and is an act to effect the object of the conspiracy.") (internal quotation omitted); and *Troutman v. United States*, 100 F.2d 628, 632 (10th Cir. 1938) (stating crime of conspiracy is complete when agreement has been formed and one or more overt acts have been done in furtherance of unlawful design)).

The *Negro* court suggested the doctrine of double jeopardy would prevent a second prosecution for conspiracy on the same facts that merely substituted different overt acts for those alleged in the first, unsuccessful prosecution. 164 F.2d at 173. It also stated an overt act is not part of the crime of conspiracy because an alleged overt act need not be proved at trial if an unalleged overt act is proved instead. *Id.*

The relationship between the overt act requirement and the elements of a general conspiracy was further addressed in *Yates v. United States*, where the Supreme Court explained, "the function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' . . . and is neither a project still resting solely in the minds of conspirators nor a fully completed operation no longer in existence." 354 U.S. 298, 334, 77 S. Ct. 1064, 1085, 1 L. Ed. 2d 1356 (1957) (internal citation omitted) (quoting *Carlson v. United States*, 187 F.2d 366, 370 (10th Cir. 1951)), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). In reaching a conclusion similar to the Second Circuit's in *Negro* regarding the function of overt acts in prosecutions under the general conspiracy statute, the Supreme Court in *Yates* did not rely upon *Negro* or the authorities supporting that decision. The *Yates* Court instead cited a Tenth Circuit decision, *Carlson*, which relied upon *United States v. Offutt*, 75 U.S. App. D.C. 344, 127 F.2d 336 (D.C. Cir. 1942). In *Offutt*, the court of appeals reviewed an indictment alleging a conspiracy under the general conspiracy statute and explained, "it is well settled that an overt act need not be a wrong. It is rather a manifestation that the conspiracy is at work." *Id.* at 340. Citing *Offutt*, the Tenth Circuit in *Carlson* stated, "the overt act merely manifests that the conspiracy is at work," 187 F.2d at 370, and numerous courts have joined *Yates* by citing *Carlson* for this proposition. *See United States ex rel. Epton*

v. Nenna, 446 F.2d 363, 368 (2d Cir. 1971) (*Carlson* citation within *Yates* quotation); *United States v. Armone*, 363 F.2d 385, 400 (2d Cir. 1966) (same); *United States v. Archbold-Newball*, 554 F.2d 665, 684 (5th Cir. 1977) (same); *Castro v. United States*, 296 F.2d 540, 542-43 (5th Cir. 1961) ("The overt act . . . need not be a crime and is not a part of the offense charged, but simply something done in furtherance of the object of the conspiracy. . . ."); *United States v. Stoner*, 98 F.3d 527, 534 (10th Cir. 1996) (*Carlson* citation in parenthetical to *Yates* citation and quotation).

In addition to showing "the operation of the conspiracy," *United States v. Medina*, 761 F.2d 12, 15 (1st Cir. 1985) (citing *Yates*), the allegation and proof of overt acts may mark the duration or the scope of an alleged conspiracy. *Fiswick*, 329 U.S. at 216, 67 S. Ct. at 227; *see also Castro*, 296 F.2d at 543 ("The only purpose of proof of the overt act is to eliminate the possibility of abandonment of the conspiracy."). Even in conspiracy prosecutions where the allegation and finding of an overt act is not required, evidence of overt acts in furtherance of a conspiracy can play a practical role because "conspiracies can usually be proved only by showing what the conspirators did in execution of them. 'Necessarily the existence of the conspiracy in most cases can be made to appear only inferentially from the acts of the parties committed in furtherance thereof.'" *Culp v. United States*, 131 F.2d 93, 100 (8th Cir. 1942) (quoting *Feigenbutz v. United States*, 65 F.2d 122, 124 (8th Cir. 1933)). *See also Blumenthal v. United States*, 158 F.2d 883, 888 (9th Cir. 1946) ("Commission of the overt acts may constitute the best proof of the conspiracy and such evidence is often used for that purpose.").

In light of these authorities, the Court concludes the function of the overt act requirement set forth in the general

conspiracy statute, 18 U.S.C. § 371, is to require the government prove the agreement to commit an unlawful act by evidence a member of the conspiracy did some act in furtherance of the alleged conspiracy.

B. No Unanimity Requirement on the Particular Overt Act Found by Jury

Considering the purpose of the overt act requirement in conspiracy law, the Court concludes there is no requirement that a jury unanimously agree on which particular overt act a member of the conspiracy committed in furtherance of the conspiracy. Although the United States Court of Appeals for the Sixth Circuit has not decided this precise issue, it has issued multiple opinions that clearly presage the answer.

In *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992), the Sixth Circuit considered a challenge to a conviction premised on a trial judge's failure to give a specific unanimity instruction to the jury in a prosecution for theft of property from an entity receiving federal funds. The indictment charged the defendant with stealing supplies and with stealing employee time that were used and expended on his private construction projects in violation of 18 U.S.C. § 666(a)(1)(A), and the defendant argued submitting these distinct theories for conviction to the jury without a specific unanimity instruction prevented any determination of which act the jury found he committed. *Sanderson*, 966 F.2d at 187. The Sixth Circuit rejected this challenge, stating the stolen supplies and stolen employee time represented distinct proof the same criminal act--*i.e.*, the theft of property from a federally-funded entity--and not distinct criminal acts as the defendant asserted. *Id.* The *Sanderson* court applied the analysis of the United States Supreme Court in *Schad v. Arizona*, 501 U.S. 624, 637-38, 111 S. Ct. 2491, 2500, 115

L. Ed. 2d 555 (1991), and interpreted *Schad* to hold "there must be a common-sense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." *Sanderson*, 966 F.2d at 188. The Sixth Circuit indicated specific unanimity instructions are not ordinarily required, yet it recognized such instructions *are* required in cases where: "1) a count is extremely complex, 2) there is variance between the indictment and the proof at trial, or 3) there is a tangible risk of jury confusion." *Id.* at 187 (citing *United States v. Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988)). Concluding the actus reas for theft of property under 18 U.S.C. § 666(a)(1)(A) could be proven by evidence of different theft acts and still satisfy traditional notions of due process, the *Sanderson* court held the lack of a specific unanimity instruction to the jury was appropriate. *Sanderson*, 966 F.2d at 189.

In 1999 the Supreme Court applied *Schad* as it analyzed 21 U.S.C. § 848, which forbids engaging in a "continuing criminal enterprise" ("CCE"), to determine whether a specific unanimity instruction is required regarding the underlying drug crimes that constitute "violations" within a "continuing series of violations" that are involved in an CCE prosecution. *Richardson v. United States*, 526 U.S. 813, 815, 119 S. Ct. 1707, 1709, 143 L. Ed. 2d 985 (1999). The Court provided the following discussion about elements of a crime and means used to commit or prove an element of a crime:

> Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime. A (hypothetical) robbery statute, for example, that makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank would have defined the crime of robbery in terms of the five elements just

mentioned. Cf. 18 U.S.C. § 2113(a). Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson v. Louisiana*, 406 U.S. 356, 369-371, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748, 68 S. Ct. 880, 92 L. Ed. 1055 (1948); Fed. Rule Crim. Proc. 31(a).

The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion); *Andersen v. United States*, 170 U.S. 481, 499-501, 18 S. Ct. 689, 42 L. Ed. 1116 (1898). Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement--a disagreement about means--would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force. *See McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (Blackmun, J., concurring).

Richardson, 526 U.S. at 817, 119 S. Ct. at 1710. After considering the particular statutory language and matters of fairness, the Supreme Court held that each "violation" was a separate element of the CCE offense and that the statute requires jury unanimity in respect to each individual violation necessary for conviction under 21 U.S.C. § 848. *Richardson*, 526 U.S. at 818-19, 824, 119 S. Ct. at 1710-11, 1713.

Two Sixth Circuit decisions applying *Richardson* to other criminal statutes are strong support for the Court's decision to not give a specific unanimity instruction on which particular overt act the jury could have found was committed in furtherance of the conspiracy. In *United States v. Davis*, a defendant asserted the jury was required to unanimously agree on which acts he committed constituted aiding and abetting. 306 F.3d 398, 412-13 (6th Cir. 2002). The Sixth Circuit discussed *Richardson* and noted the distinction "between elements of a crime, which [must] be determined unanimously, and the means by which an element may be accomplished, which does not require unanimity." *Id.* at 413. The court explained the aiding and abetting statute sets forth various means by which the crime can be accomplished. *Id.* It then concluded "although there may have been various means by which Defendant aided and abetted in the underlying offenses for which he was convicted, no unanimity instruction with regard to these various means was necessary." *Id.* at 414. Similarly, the defendant in *United States v. DeJohn* argued a jury must unanimously agree which firearm a felon or other prohibited persons possessed where multiple firearms are alleged to have been possessed in violation of 18 U.S.C. § 922(g). 368 F.3d 533, 540 (6th Cir. 2004). The Sixth Circuit rejected the argument, agreeing with the *Richardson* analysis set forth in *United States v. Verrecchia*, 196 F.3d 294, 298-301 (1st Cir. 1999). *DeJohn*, 368 F.3d at 541. The Sixth Circuit agreed the statutory phrase

"any firearm" was the element of the crime, that possession of a firearm was a means of satisfying that element, and that the legislative emphasis behind § 922(g) was on the kind of person (*e.g.*, felon, fugitive, unlawful user or addict of any controlled substance, etc.) and not on the firearm possessed. *Id.* The *DeJohn* court held:

> the particular firearm possessed is not an element of the crime under § 922(g), but instead the means used to satisfy the element of "any firearm." Therefore, the district court did not commit plain error in failing to give an instruction to the jury requiring unanimity as to which of the firearms [the defendant] possessed.

Id. at 542. The discussion in *DeJohn* is particularly instructive for this case. The general conspiracy statute, 18 U.S.C. § 71, is similar to the statute considered in *DeJohn*, 18 U.S.C. § 922(g), in that the emphasis of a conspiracy offense is not on the overt acts but rather on the agreement to commit an unlawful act. *See supra* Part II.A. Further, the statutory language "do any act to effect the object of the conspiracy" is an element of the conspiracy offense that can be satisfied by the means of any number of particular overt acts just as a violation of § 922(g) can be demonstrated by possession of any number of particular firearms.

In light of these authorities, the Court concludes particular overt acts are simply separate means of proving the overt act element and the existence of a conspiracy. Under the *Schad* and *Richardson* analysis and recent Sixth Circuit decisions in *DeJohn* and *Davis*, there is no necessity of jury unanimity on which particular overt act was committed by a member of a conspiracy to support a conviction under the general conspiracy statute. Thus, the Court did not give the jury a specific unanimity instruction.

C. Jury Is Not Limited to Considering Just the Overt Acts Alleged in Indictment

The next issue the Court faced was whether a jury is limited to considering just the overt acts alleged in the indictment in determining whether the Government has proven the overt act element of a conspiracy offense. The Court was unable to locate any cases from this circuit to demonstrate this issue has ever been considered in this circuit. However, cases from other circuits are clear a jury is not limited in conspiracy cases to considering only the overt acts alleged in the indictment.

The United States Court of Appeals for the Second Circuit has dealt with this issue repeatedly. The key case in the Second Circuit is *United States v. Frank,* in which the court stated "the well-established rule of this and other circuits [is] that the overt act element of a conspiracy charge may be satisfied by an overt act that is not specified in the indictment, at least so long there is no prejudice to the defendant." 156 F.3d 332, 337-38 (2d Cir. 1998) (citing as examples four Second Circuit cases and five cases decided by the First, Third, Fifth, Seventh, and Ninth Circuits). Most recently in *United States v. Salmonese*, 352 F.3d 608, 619 (2d Cir. 2003), the Second Circuit quoted this well-established rule as it prepared to address a question concerning proof of unalleged overt acts and satisfying the statute of limitations. The *Salmonese* court also cited *United States v. LaSpina*, 299 F.3d 165, 182 (2d Cir. 2002), which quoted *United States v. Bagaric*, 706 F.2d 42, 64 (2d Cir. 1983), for the proposition "the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy." *Salmonese*, 352 F.3d at 619. Citing *Frank*, the *Salmonese* court explained a conspiracy's operation could be proved through both unalleged and alleged overt acts as long

as a defendant is given notice of the core of criminality to be proven at trial. *Id.* (citing *Frank*, 156 F.3d at 338).

Brief excerpts from decisions of other circuits demonstrate the wide acceptance of permitting proof of unalleged overt acts committed in furtherance of a conspiracy to be considered by a jury. In *Napolitano v. United States*, the First Circuit remarked "the failure to specify any particular piece of conduct as an overt act does not prevent proof thereof . . . ." 340 F.2d 313, 314 (1st Cir. 1965). In *United States v. Adamo*, the Third Circuit stated "there is general agreement that the Government is not limited in its proof at trial to those overt acts alleged in the indictment." 534 F.2d 31, 38 (3d Cir. 1976) (citing *Napolitano* and other cases). The *Adamo* court analyzed the case under variance principles and Fed. R. Crim. P. 52(a) harmless error principles. The court said "the harmless error rule may properly be applied when an overt act in furtherance of a conspiracy proven at trial differs from any of the overt acts alleged in the indictment. Such a variance does not amount to an amendment of the indictment to alter an element of the alleged crime . . . ." *Id.* at 39. Similarly, the Fifth Circuit has stated "in a conspiracy prosecution, the government is not limited to overt acts pleaded . . . ." *Finley v. United States*, 271 F.2d 777, 781 (5th Cir. 1960). Case law from the Eighth Circuit is to the same effect. *See, e.g., United States v. Coleman*, 349 F.3d 1077, 1088 (8th Cir. 2003) ("In a charge of conspiracy, the government is not limited to proof of the overt acts charged in the indictment . . . ."); *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir. 1985) ("In conspiracy cases, the government is not limited in its proof to establishing the overt acts specified in the indictment.").

In light of these precedents, even in the absence of clear precedent from the Sixth Circuit, the Court concludes a jury

is not limited to considering just those overt acts alleged in the indictment but rather may consider evidence of overt acts presented at trial that fit within the scope of the alleged conspiracy.

III. CONCLUSION

The Court is satisfied the law does not require the jury to be unanimous in its determination of which particular overt act was committed in furtherance of a conspiracy. The Court is also satisfied the jury is not limited to considering just the alleged overt acts in reaching its determination of the existence of an overt act in furtherance of the conspiracy. Accordingly, the Court charged the jury in this case in light of the authorities discussed in this memorandum.

SO ORDERED.

ENTER: July 8, 2004

/s/

CURTIS L. COLLIER

UNITED STATES DISTRICT JUDGE